

RHETORIZED CONSTITUTIONALITY
DESCRIBING – DEFINING - DECIDING IN *KELO*
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SUMMARY

In June 2005, the Supreme Court in a Five to Four Decision marked its most controversial decision in recent memory. The case of Kelo v. City of New London, set off a fire storm of response to the Court's ruling that economic development takings satisfied the fifth amendment. This essay is about Kelo. But it is also about more than Kelo. It is about how the Court uses words, how the defining ability of words creates institutional space in which the Court operates, and which defines things beyond the words.

ESSAY

Words by their nature define things and events through an agreed upon convention of meaning. We don't argue with each other whether "and" is a conjunction that joins or distinguishes – the rules that govern such determinations were established a long time before we began using the medium of conversation and composition that we use. What we argue over, then, more often than not, is the way structure creates new definitions for words -- how prose defines the words around it in a way that creates new meaning.

The problem with words, their definitions, and manufactured meanings within structures, is their finitude. James Boyd White described the frustration of casting humanity in limited vocabulary:

The lawyer must face the reality of her client's experience, and the fact that it can never adequately be cast into the language the lawyer is given to speak: the suffering, the uncertainty, the frustration, the sense of the story from the client's point of view, can never be adequately represented in language, without loss or distortion. Nonetheless, the lawyer's job is to find a way to talk about this experience in the language of the law; this means that she is always thinking about that language itself, what it can do, what it can be made to do, and what its limits are.¹

¹ James Boyd White, *What We Know*, 10 CARDOZO STUD. L. & LIT. 151, 152 (1998).

In other works, he has described this process as a rhythm between hope, disappointment, and acceptance² and as an analogue to translation³ as a means of understanding the limits of language.

Despite the finite nature of language, language does create powerful and moving images. Words are intended to create meaning that etch into the readers subconscious concrete images. Words are a metaphysical tapestry, creating in space that does not exist, images that do not exist, but which are strong and malleable, boundless and bounded for the reader to grasp onto. Much of the way that we perceive words depends on the context of our surroundings. I will give an innocuous example. If I say the phrase “St. Elmo’s Fire” several images could come to mind. One may be the image of the 1985 movie by the same name, its cast of characters, or one particular character that the reader identifies with. One might hear in the recesses of his mind the St. Elmo’s Fire love song with its powerful piano rifts or the song *Man in Motion* by John Parr which references the same phrase. One may picture the significant person they first saw the motion picture with or if the reader attended Georgetown University or lived in the Georgetown area of Washington, DC, he may picture Tombs, the bar that the mythical St. Elmo’s bar mimicked. If one were scientific, he might instead think of the “Corona” effect given to objects when lightning strikes, leaving a purple glow about the edges of the object. If one were a sailor, he may think of the person St. Elmo and the effect of St. Elmo’s fire; St. Elmo is the patron saint, and the “fire” (Corona) is a sign of his protection. And other images unknown to me

² James Boyd White, *The Rhythms of Hope and Disappointment in the Language of Judging*, 70 ST. JOHN’S L. REV. 45, 46 (1996) (“Legal Language seems to have [a rhythm that moves from hope to disappointment to acceptance] on a sharpened and clarified form...that is: as the utterance of a sentence holds out a possibility towards which we orient ourselves -- of intelligibility, of community, of truth – the law’s task is to do exactly that on a larger scale: to set forth ideal possibilities towards which we can strive, without which our energies would have no direction.”).

³ James Boyd White, *Translation as a Mode of Thought*, 77 CORNELL L. REV. 1388, 1393 (1992) (“If it is recognized that translation always involves significant gains and losses in meaning, there can be no universal language in which universal truths are uttered.”).

probably appear for others. The common link between all of these images is an experiential contact with the phrase “St. Elmo’s Fire” that makes the word have a particular meaning to that person.

One obvious conclusion from the example given above is that words tend to implicate people, places, and events within the imagination. Obviously, the images are not real; they are instead our perceptions of the images that we retain within our minds. Constitutional words tend to work under the same limitations, except that they imagine people and places within specific institutions.⁴ “We the People of the United States” directs our minds not only to a specific group that ordained our government, but to the places it ordained, and the actual signing of the documents in 1787. Imagining Constitutional things brings about the same hazards that occur when mere words produce images: they can be deceptive, luring our emotions, shared mythical perceptions, and aspirations into a realm where words are redefined towards catatonic trances or ecstatic delusions of what those words “should” mean.⁵ Said slightly differently, we can become

⁴ Consider Ronald Rotunda’s description of the struggle over words within American political discourse: Though all widespread symbols are important, certain symbols, at various times, carry particular significance. In fact, much of the United States political history can be interpreted as a rivalry for the possession of certain words. In the early days of our republic, the Hamiltonians – those in favor of a strong national government – called themselves Federalists, though at that time “federation” meant what confederation means today. The “true-federalists” found themselves at a tactical disadvantage: they were in the position of arguing against federalism because they had accepted the label “Anti-Federalist.”

RONALD ROTUNDA, *THE POLITICS OF LANGUAGE* 9 (1986).

⁵ Consider James Boyd White’s description of the phrase “We the People” within the Constitution: In what sense was it in fact “the People” who spoke there? Of course the document was ratified in each of the states, at conventions assembled for that purpose; in this sense, it was indeed the act of the People. But who was permitted to vote for representatives at those conventions? Certainly not slaves; in most states certainly not African Americans and Indians; certainly not women; in most states nobody who failed to meet certain property qualifications. Does this mean that the statement “We the People” is false and hypocritical? In one sense the answer is yes. But would it really have been better if the Constitution said, “We, the voting population of propertied white males, do hereby ordain and establish the Constitution of the United States?”

Rhythms, *supra* note 2, at 47.

euphorically affixed on a particular meaning while other meanings tend to silently fade into the background noise of our own interpretations. Those meanings we affix therefore become as sacred and as passionate as our perceptions of the document itself. You rarely hear someone blandly say that their Amended Rights of Freedom of Speech Composed in 1787 have been violated; it's an excited declaration that "MY FIRST AMENDMENT CONSTITUTIONAL RIGHTS WERE TRAMPLED UPON." Interpretations of the Constitution that don't vindicate our own rights are rarely relevant.

That is why the public response to *Kelo v. City of New London* is so interesting. Decided in June 2005, *Kelo* found that the city of New London's economic development plan, which authorized the use of eminent domain to take land from one private owner and give it to another, was constitutional. Notably the named plaintiff, Susette Kelo contended that because the home they were living in, and the neighborhood they occupied was not a public nuisance, the public use doctrine did not apply, and therefore the act was unconstitutional. The overwhelming feeling regarding *Kelo* is that the Supreme Court decision is an assault on property rights in general, not just Ms Kelo's. In large measure, this idea is due to the Constitutional imaging in both the majority and the dissenting opinions of the case.

This essay explicates this tension described between imaging and defining constitutional standards and places within the *Kelo* decision.⁶ On one level, this could be done by analysing the responses to the *Kelo* decision, how academics described the case, its fallout and implications. For example, Richard Epstein commented that:

Kelo galvanized the public at large because [it] unified the progressives with the classical liberals as few issues can. The

⁶ 125 S.Ct. 2566 (2004).

progressives who believe in community were hard-pressed to see how New London and its development corporation were anything other than the usual conspiracy of the rich and the powerful against the common man. The classical liberals were only strengthened in their belief that this sorry episode showed the dangers of faction and rent seeking that only a strong system of property rights can effectively resist.⁷

The images created by Epstein's second hand commentary certainly tell us something about *Kelo*.⁸ It *galvanized* the public. It *unified* progressives and classical liberals. Moreover, his definitions of political orientation create spaces for determining how one reacts to *Kelo*. He signals that there are two responsive groups -- of progressives and classical liberals -- that orient the reader towards the interpretive affiliation she may approach this constitutional problem with. Other phrases such as "conspiracy of the rich and powerful against the common man," and "strong system of property rights" tell us something about the orientation by which those groups generally respond to constitutional problems. But importantly, the words tell us little about *Kelo* itself: they are perceptions of what *Kelo* did and who it affected, not of *Kelo* itself. Such commentaries only tell us about the reactions to the rhetoric.

⁷ Richard Epstein, *KELO: AN AMERICAN ORIGINAL, Of Grubby Particulars & Grand Principles*, 8 GREEN BAG 2D 355, 357 (2005).

⁸ Similar problems that could be analyzed is how active speech – acts meant to communicate – reflect the same tension. For example, the ways that one citizen's protest has been characterized within the media raises certain vernacular intrigues. The WorldNET Daily internet news source described the application that the individual, one Logan Darrow Clements made to the Town of Weare regarding Justice Souter's property: Wrote Clements: although this property is owned by an individual, David H. Souter, a recent Supreme Court decision, *Kelo v. City of New London*, clears the way for this land to be taken by the government of Weare through eminent domain and given to my LLC for the purposes of building a hotel. The justification for such an eminent domain action is that our hotel will better serve the public interest as it will bring in economic development and higher tax revenue to Weare." The article goes on to describe Clement's plans for resort amenities including "the Just Desserts Café," and a museum to the loss of freedom in America. "Instead of a Gideon's Bible in each room, guests will receive a free copy of Ayn Rand's novel 'Atlas Shrugged.'" See Ron Strom, *This Land was Your Land: Supreme Court Justice Faces Boot from Home; Developer wants Lost Liberty Hotel built upon property of David Souter* (June 28, 2005) at http://worldnetdaily.com/news/article.asp?ARTICLE_ID=45029.

In contrast, this essay takes a very limited approach. It asks what are the images induced by notions of place and space within the *Kelo* opinions. That is, how do members of the court define particular images, and what do those images mean for understanding Constitutional doctrines of “Economic Development Takings, and “public use” versus “private use.” A key method used in this analysis is to define two terms of art – place and space, and then to distinguish between the ways members of the court define place and space within the opinion. The essay suggests that the significant moves reflected in *Kelo* is the abstraction of particularized locations (place) and to particularize abstract locations (space). The value of this exercise is to reflect upon what can be imagined by reading and writing Constitutional words. Do they in fact picture concrete places such as “homes,” “roads,” and “public buildings.” Or are they more spatial, defining ideas instead of things.

The essay concludes with no satisfactory answer. Indeed, any conclusion that I may offer regarding economic development takings is likely moot, given the recent Congressional moves to limit *Kelo*.⁹ Additionally, because I subscribe to a Constitutional methodology that values the date of the opinion as the most telling aspect of the case¹⁰ – this essay does not attempt to make an argument styled as “the trends of the court” or to develop a post-modern theory of Constitutional law. What it does offer is a pedagogical exercise that calls our attention to the way the Supreme Court uses images in one particular Constitutional case.

A. Defining Place and Space

⁹ The proposed Bipartisan Private Property Protection Act (BIPPPRA) states that “In the wake of the Supreme Court’s decision in *Kelo v. City of New London*, abuse of eminent domain is a threat to the property rights of all private owners, including rural land owners. H.R. 4128 § 9(4) (109th Congress 2005). It proposes to restrict state and local eligibility for federal development funds if that state or local government misuses the Eminent Domain Power.

¹⁰ See H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS, 3 (2002).

I want to start with a basic definition of space and place and then give an example. Space is an area occupied by persons or things, ideas, or institutions. Place is the particularized location within space. Suppose I wanted to describe a specific building. The first step is to create the basic structure: the building. Next, adjectives, such as colour and size could be added to give further expression: the large brown building. I could also add surroundings to my description to further describe the scenery: the large brown building, with a flush green lawn, spacious parking lot, and bustling court yard. Agreed upon markers of location is another aspect that helps define my description: On Science Drive, the large brown building, with a flush green lawn, spacious parking lot, and a bustling court yard. Finally, I might add something about the building's purpose, activity or meaning: the Duke University law school was housed on Science Drive in a large brown building with a flush green lawn, a spacious parking lot, and bustling court yard where students anxiously awaited their civil procedure class. Importantly, the picture I provided became dramatically more understandable when I added the purpose and activity being conducted within the building. Until my description perfected an absolute image, the description was merely a space. As the realm of possibilities narrowed, and the object became clear, it obtained a "place."

The space that can be derived from my description, though, is more complicated. Two different formulations of space can be described from the example above – one physical and one metaphysical. First and most apparent is the physical space that the brown building occupies in reality – the physical domain that regardless of what sits upon it is a linear, measurable, and calculable area.¹¹ In such descriptions, the distinction between space and place are easily

¹¹ See Igor Stramignoni, *Francesco's Devilish Venus: Notations on the Matter of Legal Space*, 41 CAL. W. L. REV. 147, 170 (2004).

associable as the space becomes a place when it is particularized or named as a location. Places necessarily occupy spaces.

But there is a second way that space is implicated in the description of the brown building above – a metaphysical description of space. Certainly, the meets and boundaries of the law school can be used to define the physical space and certainly naming that boundary raises the area to the notion of place. But the physical space is not the only way to describe Duke Law; it can also be defined by the unseen, unbounded characteristics that move freely within physical space. Specifically, Duke Law maintains a space defined by persons, ideas, and importantly words – institutional space.¹² Thus, the images that comprise Duke Law, its faculty, students, alumni, clinics, institutes, ideas etc.... take up metaphysical space within various defining communities.¹³ As those communities are named, the place maintained within the institutional space becomes institutional place, definable like physical boundaries are defined. The area it occupies can be identified by specific criteria and specific measurements that establish the institutional characteristics of the space. For example, as ideas become normative, they obtain institutional space. One expression of this way of talking about normative space from the

¹² *See id.*

[S]pace is each time the place resulting from a given institutional context (broadly understood) – namely, a particular socio-political or linear-historical environment – rather than, as noted earlier, a mute physical object that can be found “out-there” or even the particular subjectivity that each time would go to express it. In a way, there is now a mere shift of focus – from the institution of space (space as a thing or else space as the thing of a subject) to space as an institution, individual or collective, historical or socio-political – yet such a shift is, in its different and progressively more and more abstract versions of it, rather momentous.

A timely example of how institutional space differs from physical space is the displacement of New Orleans law schools in the wake of Hurricane Katrina. Loyola New Orleans law school continued operating in Houston outside of the physical boundaries of the city of New Orleans. The institutional space was not compromised by the displacement of the law school, only the physical space.

¹³ Such relevant communities might be lawyers, the local community where the law school is located, the University Community, the American Association of Law Schools, etc...

theological field is the Gospel writer Matthew's identification of the Kingdom of Heaven as both a physical place and a normative concept.¹⁴ The common way of stating this is that the Kingdom of Heaven is both a present reality (in the body of Jesus and the congregant of believers) and as a hope yet to come (an aspirational norm that bounds current institutions).¹⁵ The conclusion though to this is that ideas can be particularized or can be spatial, leaving to the imagination to complete its formation.

Constitutional ideas start with a boundary already created. The words that are used to describe Constitutional things begin from a context rich history of debate and discourse. But within those boundaries, the place is still not necessarily defined. There is quite a lot of room to define new things in the large open spaces of the Constitution.

B. The Spaces and Places of *Kelo*

One obvious tension in the *Kelo* opinions is whether specifically named properties (places) have specific meaning within the takings provisions. It is notable that within the majority opinion, the property is described as very generic -- either "private property" "parcels"

¹⁴ Compare the following statements from the Gospel of Matthew: Matthew 3:2 ("repent for the Kingdom of Heaven is near"); 5:3 ("Blessed are the ... for theirs is the *Kingdom of Heaven*"); 5:19 ("Anyone who breaks the least of these commandments and teaches others to do the same will be called least in the Kingdom of Heaven"); 5:20 ("you will certainly not enter the Kingdom of Heaven"); 11:12 ("the kingdom of Heaven as been forcefully advancing"); 13:11 ("the knowledge and secrets of the Kingdom of Heaven has been given to you"); 13:24 ("the Kingdom of Heaven is like a man who sewed good seed in his field"); 13:31 ("the Kingdom of Heaven is like a mustard seed"); 13:33 ("the Kingdom of Heaven is like yeast that a woman took and mixed into a large amount of flour until it worked all through the dough"); 13:44 ("the Kingdom of Heaven is like a treasure hidden in a field"); 13:45 ("the Kingdom of Heaven is like a merchant looking for fine pearls"); 13:47 ("the Kingdom of Heaven is like a net that was let down into the lake"); 16:19 ("I will give you the keys to the Kingdom of Heaven"); 19:12 ("others have renounced marriage because of the Kingdom of Heaven").

¹⁵ Compare Stanley Hauerwas, *THE PEACEABLE KINGDOM*, 82 (1983) ("To begin to understand Jesus's announcement of the Kingdom, we must rid ourselves of the notion that the world we experience will exist indefinitely. We must learn to see the world as Israel had learned to understand it -- that is eschatologically... to see it in terms of a story, with a beginning, a continuing drama, and an end"); with RICHARD B. HAYS, *THE MORAL VISION OF THE NEW TESTAMENT* 322 (1996) ("In sum, the Kingdom of God as figured forth in Matthew 5...offers a vision of radical counter cultural community of discipleship characterized by a higher righteousness.").

or “houses.”¹⁶ In contrast, Justice O’Connor’s dissent from the majority is filled with compelling imagery designed to animate the properties and houses towards the specific properties: instead of property, she talks about “homes.”¹⁷ Are these language variations meaningful for understanding the takings jurisprudence or are they images that neither help nor confuse the constitutional analysis?

In the same way that the descriptive tendencies of the majority and the dissenters are in tension, the reflections of institutional space (the ideas of Constitutional takings and their structures) are also at odds between the majority and the dissenters. I choose three concepts of institutional space that are extractable from *Kelo* to describe how descriptions of physical and institutional space define the takings problem: (1) the genre of the takings at issue; (2) the definitions of public use and private use; and (3) the formulation of specific places as spaces.

1. The Economic Development Genre

The early portions of the *Kelo* opinion tell us that this taking fits into the category of “economic development.”¹⁸ By defining the genre of the taking as economic development, the court identifies the space it will be working from within the Fifth Amendment. Perhaps just as important, it eliminates other space that is not relevant to the discussion, such as regulatory takings. Therein, the institutional space is narrowed to a specific subset – we move from Constitutional to Fifth Amendment Takings to Economic Development Takings.

¹⁶ *Kelo*, 125 S. Ct. at 2658 (“In assembling the land needed for this project, the city’s development agent has purchased property ... to acquire the remainder of the property... the proposed disposition of the property...); *id.* at 2659 (“parcel 1 is designated ...”); *id.* at 2660 (“Sussette Kelo has lived in the Fort Trumbull area since 1997. She has made extensive improvements to her House”).

¹⁷ *Id.* at 2672.

¹⁸ The beginning line of the opinion sets the stage: “In 2000, the city of New London approved a development...See *Kelo*, 125 S. Ct. at 2658. Later in the opinion, the Court defines the question: “We granted Certiorari to determine whether a city’s decision to take property for the purpose of economic development satisfies the “public use” requirement of the Fifth Amendment.” *Id.* at 2661.

So, economic development space is defined by the community of authorities surrounding it. First and foremost is the Fifth Amendment's due process and takings clause: "No person ... shall be deprived of life, liberty, or property, without due process of law, nor shall private property be taken, for public use without just compensation."¹⁹ Next, the community of cases that have been lumped together as constituting "economic development" help define the boundaries of the genre. Specifically, the Court identifies three cases that describe the boundaries of economic development.²⁰ By identifying *Kelo* as economic development, the Court thus finds the space in which the case is to be conceptualized within the overall scheme of the Fifth Amendment.

Second, the name "economic development" carves out a space for what the court perceives as happening in the case. The images that the words themselves proffer are defining postures of improvement. Thus the descriptions employed by the majority to define the area to be condemned bring to mind images of a well-worn, past its prime town. It uses the terms "economically distressed city" and "distressed municipality" to create a dark overtone over the city of New London.²¹ In contrast, the pictures of hope and improvement that economic

¹⁹ U.S. Const. Amend. V.

²⁰ See *Kelo*, 125 S.Ct. at 2663. The court identifies *Berman v. Parker*, 348 U.S. 26 (1954) (wherein the court decided that a community development plan to erase slums from the Washington D.C. area was a proper taking); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) (wherein the court decided that the taking of land was necessary to overcome a history of land oligopoly in the state of Hawaii); and *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (wherein the court decided that pest control companies could pay just compensation for trade secrets in the pesticide industry to remove entry barriers from the market place).

²¹ *Kelo*, 125 S.Ct. at 2658 ("In 2000, the city of New London approved a development plan that ... was "projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to *revitalize* an *economically distressed city*" (emphasis added); *id.* ("Decades of economic decline led a state agency in 1990 to designate the city a 'distressed municipality.'"); *id.* ("In 1998, the City's unemployment rate was nearly double that of the State")

development creates instigates images of a “small urban village” with a riverwalk, shops and restaurants.²² The new images cast a positive disposition over the future of the declining town.

This theme of contrasting distress with improvement is also seen in the community of cases that *Kelo* sits with. In both *Berman v. Parker* and *Midkiff v. Hawaii Housing Authority*, the relevant imagery is the contrast between a bad situation and improvement. The Court describes the takings in *Berman* as “targeting a *blighted*” area of Washington D.C. The key words were the desire for a “better balanced, more attractive community.”²³ In *Midkiff*, the problem was a “social and economic evil” in the form of a “land oligopoly.”²⁴ In response, the *Midkiff* court says that legislatively induced balance within the real estate market is an appropriate remedy for the evil of land oligopoly.²⁵ The vocabulary used by the *Berman* Court, the *Midkiff* Court, and the *Kelo* Majority insight passionate images. Blight, evil, and distressed are intended to stir

²² *id.* at 2659

²³ *Id.* at 2663. Notably, the rhetoric of “slums” was used by the *Berman* court to describe the problems that warranted a public purpose. As the court described, slums arose from “the overcrowding of dwellings, the lack of parks, the lack of adequate streets and alleys, the absence of recreational areas, the lack of light and air, the presence of outmoded street patterns.” *Berman v. Parker*, 348 U.S. 26, 34 (1954). Moreover, the presence of slums produced other social evils:

Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river

Berman, 348 U.S. at 32.

²⁴ *Kelo*, 125 S.Ct at 2663. *Midkiff*'s imagery is not the warning that slums or economic decline may have for a community, but the evils associated with kings and crowns. The court's association of land ownership patterns in Hawaii and the American struggle for Independence is particularly captivating. *See Midkiff*, 467 U.S. 229, 242 (1984) (“the people of Hawaii have attempted, much as the settlers of the original 13 colonies did, to reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs”). Like the American Colonists who tore off the bonds of tyranny that similar land feudal systems represented, the Hawaiian's were attempting to do the same.

²⁵ *Midkiff*, 467 U.S. at 2330 (“Redistribution of fees simple to correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly is a rational exercise of the eminent domain power.”).

responses. Equally important are the responses that define the action being undertaken: “balance,” “opportunity,” and “revitalization.”

The dialogue between the majority and the dissenters regarding this aspect of the case highlights the tension between defining institutional space. On the one hand, the O’Connor led dissent wants to show that the standard of betterment weakens the jurisprudence because any property can be taken on its potential to be better.²⁶ Akin to this claim, O’Connor wants to show that particular properties can be distinguished from generic spaces.

New London does not claim that Sussette Kelo’s and Wilhelmina Dery’s well-maintained homes are the source of any social harm. Indeed, it could not so claim without adopting the absurd argument that any single-family home that might be razed to make way for an apartment building or any church that might be replaced with a retail store, or any small business that might be more lucrative if it were instead part of a national franchise, is inherently harmful to society and thus within the government’s power to condemn.²⁷

Specifically, the types of properties are homes that are cared for, like Ms. Kelo’s home. They have an aesthetic quality that makes them different from the property in the *Berman* case (a department store) and the property in the *Midkiff* case (tracts of land).

This is precisely where the majority is able to quibble with O’Connor’s viewpoint. The majority in a footnote states “Nor do our cases support Justice O’Connor’s novel theory that the government may only take property and transfer it to private parties when the initial taking eliminates some ‘harmful property use.’ There was nothing harmful about the non-blighted department store at issue in *Berman*...”²⁸ In this small bite, court shows us how place defines or

²⁶ *Kelo*, 125 S.Ct. at 2675 (“But nearly any lawful use of real private property can be said to generate some incidental benefit to the public.”).

²⁷ *Id.* at 2675.

²⁸ *Id.* at 2666 n.16. For a detailed discussion of “Betterment” as institutional space, see *infra* subsection B(2)(a).

doesn't define the constitutional question. Like Mr. Berman's department store, Ms. Kelo's property is well-kept; unlike Mr. Berman's store, her property is a home.²⁹ Does this make a difference? No, says the majority, because takings have nothing to do with how well a property is maintained or to what use the property is put. The Court says: "In each case, the public purpose we upheld depended on a private party's *future use* of the concededly non-harmful property that was taken. By focussing on a future use, as opposed to its past use [or current condition], our cases are faithful to the text of the Takings Clause."³⁰ Thus, the majority has oriented the reader with one defining sentence, describing the boundaries that economic development takings occupy as institutional space: (1) they are purpose oriented; (2) as described by other economic development cases; and (3) are bound within the Takings clause of the Fifth Amendment.

b. Defining public and private use

The next institutional space that *Kelo* overlaps is a question of how we constitutionally define a public and private use. The majority notes that public use can be defined by specific "place;" certainly takings that are for the construction of public buildings or for common carriers satisfy a public use.³¹ Equally clear is that the taking for the purpose of conferring a "purely private benefit on a particular private party" is forbidden.³² The court has again defined the boundaries about which the space we are operating in is determined. The court then narrows those boundaries. First it notes that the development plan by the city is not one intended to

²⁹ For a more detailed discussion of Home as a definer of space, see *infra* subsection B(2)(c).

³⁰ *Id.* at 2666 n. 16.

³¹ *Id.* at 2661.

³² *Id. citing Midkiff*, 467 U.S. at 245 ("A purely private taking could not withstand the scrutiny of the public use requirement"); and *Missouri Pacific R. Co. v. Nebraska*, 164 U.S. 403 (1896). The court further expounds this limitation noting that the city could not take property under the pretext of a public use if the actual purpose was to bestow a private benefit. *Id.*

benefit a particular class of individuals. But then it notes that the land to be condemned is not to be opened up to the public at large.³³ Thus, the court defines the problem as setting that problem within an area of interpretation that rests between two polar opposites, which if either were true, would determine the result of the case. Then, looking to the community of decisions surrounding this question, the court determines that this taking in particular suffices as a public use and therefore is appropriate.³⁴

And its this way of defining the public use /private use dichotomy that the dissenters are most concerned with: “to reason, as the court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings ‘for public use’ is to wash out any distinction between private and public use of property – and thereby effectively to delete the words ‘for public use’ from the takings clause of the Fifth Amendment.”³⁵ After differentiating why *Kelo* was different from *Berman* and *Midkiff*, O’Connor writes:

Yet for all the emphasis on deference, *Berman* and *Midkiff* hewed to a bedrock principle without which our public use jurisprudence would collapse: “a purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void. To protect that principle, those decisions reserved “a role for courts to play in reviewing a legislature’s judgment of what constitutes a public use...[though] the Court in *Berman* made clear that it is an ‘extremely narrow one.’³⁶

Importantly, O’Connor’s dissent suggests that a primary role of the Court is to define Constitutional terms:

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³⁵ *Kelo*, 125 S. Ct. at 2671.

³⁶ *Kelo*, 125 S.Ct. at 2674 (O’Connor, J. Dissenting).

We give considerable deference to legislatures' determination about what governmental activities will advantage the public. But were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than horatory fluff. An external, judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on government power is to retain any meaning.³⁷

One might notice that the disagreement between the majority and the dissent is not based on what is or what is not a public use. Rather, the institutional space this discussion occupies is whether the court is in the best position to define public use beyond its prior statements.

It may be worth noting that Courts engage in defining exercises all the time. For example, the Court defined the meaning of privacy from the Constitution, some would say out of thin air. One explanation for the court's hesitancy to define public use in tangible terms is the difficulty in defining terms and things in inconsistent ways. "Public use" is much more pliable and susceptible as an abstract concept than as a concretely defined term. I can feel a road, see it,

³⁷ *Id.* at 2673. There is also a sense in which O'Connor is regretful over the language she used in *Midkiff*.

There is a sense in which this troubling result follows from errant language in *Berman* and *Midkiff*. In discussing whether takings within a blighted neighbourhood were for a public use, *Berman* began by observing "We deal, in other words with what traditionally has been known as the police power." From there it declared that "once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. Following up, [I for] we said in *Midkiff* that "the 'public use' requirement is coterminous with the scope of a sovereign's police powers." This language was unnecessary to the specific holdings of those decisions. *Berman* and *Midkiff* simply did not put such language to the constitutional test, because the takings in those cases were within the police power but also for "public use" for the reasons I have described. The case before us now demonstrates why, when deciding if a taking's purpose is constitutional, the police power and "public use" cannot always be equated.

Id. at 2673. Notably, the Court does not even mention the words "police power" within its opinion. Its obvious to O'Connor that the Police Power is somehow implicated by the majority's decision. Is there meaning behind the majority's failure to define this case as following within the police power? Is it merely a case that omitted its *raison de etet*. Or is the Police Power lurking behind other definitions, still present, imagined, but not stated? It seems O'Connor thinks so.

and therefore gain experiential knowledge that its in front of me. The “public use” the court defines exists outside of such empirical datum – it is to a certain degree elusive, which makes it more adaptable.

I am carefully choosing my words. I do not want to write that the court is activist (whatever that means) or even that *Kelo* was incorrectly decided (which may or may not be true). What I do want to communicate is the way the court used abstraction to reach the meaning of the Fifth Amendment’s takings clause that it wanted to reach, particularly its refusal to isolate a specific place within the institutional space that is public use.

3. *Physical Places as Institutional Spaces*

To this point, we have only described how place and space contrast each other to create a definitional dichotomy defining economic development and public use. One final example is the recasting of physical place by the dissenters as institutional space. One foremost example is Justice Thomas’s description of the home. Thomas writes: “The Court has elsewhere recognized ‘the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the republic,’ when the issue is only whether the government may search a home.”³⁸ He continues describing the meaning of the *Kelo* opinion with the Court’s previous stance: “Though citizens are safe from the government in their homes, the homes themselves are not.”³⁹ Thomas’s “Home” becomes definitional towards the liberties individuals can expect and must be read to consistently protect those liberties. Thomas’s argument said slightly more argumentatively might go something like this: “how can the Home safeguard citizens within the meaning of the fourth amendment if it can be seized under the Fifth Amendment. Thus for

³⁸ *Id.* at 2685

³⁹ *Id.*

Thomas, the institutional space of the Home as read through the Fourth Amendment must continue through the Fifth (and arguably the Sixth, Seventh, Eighth, etc...).

Thomas has a point only if you accept his initial conclusion that words should be consistently defined every time they are used. We know that this is not always the case within the realm of Constitutional interpretation. For example, the first seventy-one years of our country saw different *legal* definitions of the word person: it could mean all people, black and white, male and female (such as in the criminal law); or all white people (such as in Constitutional Law); or all white male people (such as in voting public). One could argue back to Thomas that the Court historically has no problem with inconsistency of terms.

A second example of place becoming institutional space is the O'Connor use of labelling. One example of this labelling flows from the possibilities that O'Connor envisions occurring to any property: "The spectre of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."⁴⁰ O'Connor uses the idea of what a "Ritz Carlton" replacing a "Motel 6" symbolizes. This can also be seen by O'Connor use of the word "home" to describe Susette Kelo's property. She wants to use places to define the boundaries of property by the images people imagine – by "Motel 6's," "Ritz-Carltons," and "homes." Thus, for the community of economic developments, the concept of home is more important than any single manifestation of it.⁴¹

One point that can be made in reviewing the three examples of the use of institutional space is the tension that exists between defining things and defining concepts. Just as Thomas

⁴⁰ *Id.* at 2676.

⁴¹ One might also recall O'Connor's earlier First Amendment opinion in *Frisby v. Schultz*, where the rhetoric of the Home is also described. 487 U.S. 474 (1988).

wants “homes” to be “homes,” Stevens would rather talk about public and private uses. The court’s hesitancy in *Kelo* to define “things” may reflect the abstract nature of our Constitution. In the example of *Kelo*, private things can be made public so long as the boundaries of the space they occupy permit it to be so defined. And yet, there is a certain discomfort we feel when the Court uses words that mean one thing as if they mean the opposite.⁴² To this point, my initial discussion of the nature of words creating images becomes relevant. If words can create different images for different people, we should have no problem with a court that uses a word one way in one context and another in a different context. If institutional surroundings conjure different images to different persons, then the words are only as relevant as the person who is using or interpreting the words – in this case five justices that thought private use can sometimes mean public use.

A second related point is that even when the court may not be engaged in defining things, it is perpetually engaging in institutional definition, defining the ways cases should be thought about by outsiders. James Boyd White’s insightful comments reach this point: “In each case, the court is saying not only ‘This is the right outcome for this case,’ but also, ‘this is the right way to think and talk about this case, and others like it.’”⁴³ The conclusion one might draw from this discussion is that the court is steering constitutional law interpretation towards abstraction. Another viable conclusion is that the court abstracts definitions when the institutional space which the object occupies (this time economic development takings) requires abstraction. Which ever mode you choose to rest upon, the court decides and defines by its own words what the channels of discussion will look like: it sets our imagination.

⁴²See STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE, AND MIND 105 (2001) (“The Judge, no less than others, is enmeshed in and dependent upon the structures of social meaning that make communication possible... Imagination is systematic and orderly rather than chaotic or anarchic”).

⁴³ James Boyd White, *What’s an Opinion For*, 62 U. CHIC. L. REV. 1363, 1366-67 (1995).

C. Interpreting the wave Defining Space and Place in the Constitution.

At the end of Part A, I said that “there is quite a lot of room to define new things in the large open spaces of the Constitution.” What I meant was that the boundaries of the Constitution itself are relatively open, leaving much for specification. I now want to put forward my theory of how space is defined in the Constitution, using economic development takings as my illustration. I will do so visually as well as verbally.

The Constitution starts with a set of ideas contained by words. The specific words that we are concerned with are the Fifth Amendment’s due process clause “No person ... shall be deprived of life, liberty, or property, without due process of law, nor shall private property be taken, for public use without just compensation.”⁴⁴ The central question then, for economic development takings issues is what constitutes public purpose. If the idea

is a constitutional idea,

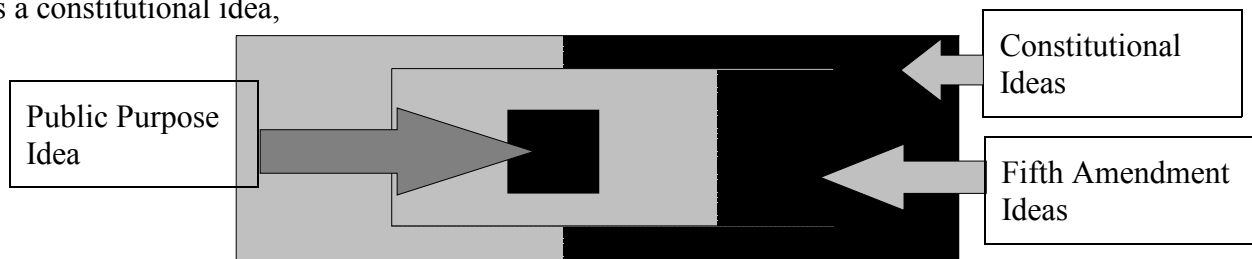


Fig. 1

Constitutional ideas, the box inside of it represents fifth amendment takings problems, and the box inside of that represents the idea of a public purpose. (Figure 1). We are working strictly inside the public purpose box. If we were to illustrate this by drawing our box with two halves, one side would be physical manifestation of ideas, and the other would be institutional expression. The line dividing the two is the words. (Figure 2).

⁴⁴ U.S. Const. Amend. V.

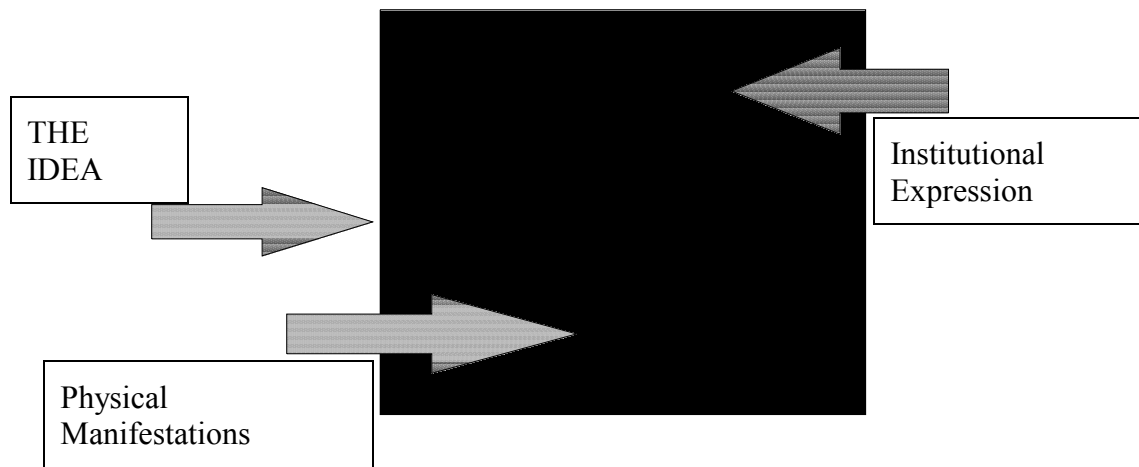


Figure 2

In defining the idea of the public purpose before *Berman*, the Court talked about things. It talked about buildings, roads, and parks. Thus, the physical manifestation of the idea grew. (Figure 3).

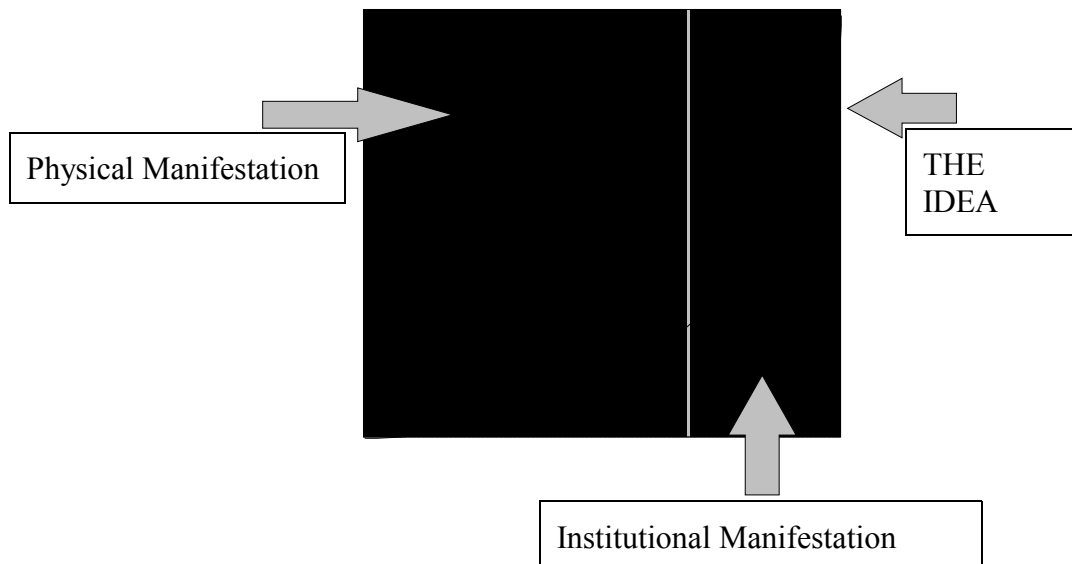


Figure 3

Notice that the space in which the physical manifestation of the idea grows while the institutional manifestation shrinks. Note also, though that the institutional idea does not

disappear. Rather, the physical manifestation of the idea predominates. This is the space that takings operate in pre-*Berman*. After *Berman* and *Midkiff* the space begins to move the opposite direction. Thus the curve is reversed. (Figure 4).

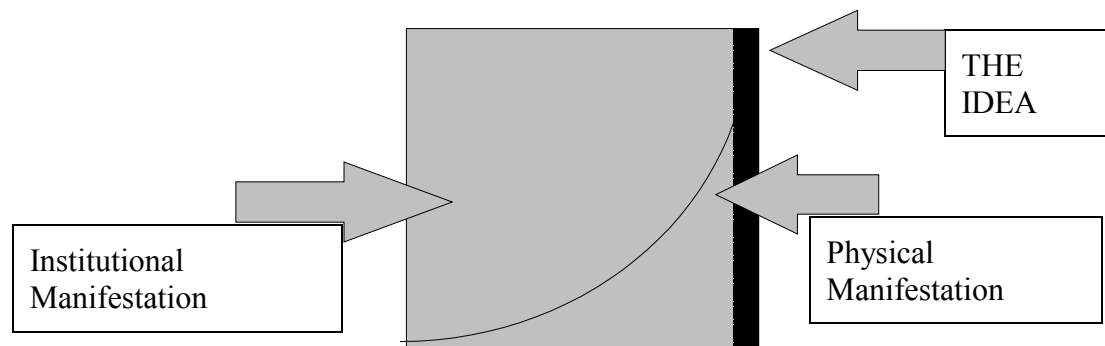


Figure 4

My argument is that what the dissent and the majority argue about in *Kelo* is the placement of the line separating physical and institutional manifestations – specifically, the direction of the swing that separates institutional manifestations of ideas from the physical. That is, they argue whether the words should create more physical spaces bound by physical descriptions – public buildings, roads, etc... – or whether those word should represent spaces that are ideas.

At the same time, as the diagrams above show, the reality remains that all we are talking about is ideas. The physical places are simply ideas themselves. O'Connor's and Thomas's description of the home is more about an idea of what the home is about or what it should protect than it is about a physical location called home. In this sense, the images created by constitutional language tends to define what the parameters of the Constitution is supposed to inhere to.

CONCLUSION

I started this essay by describing how language creates images. I conclude this essay by suggesting that language employed by courts creates institutional images that either result in a concrete manifestation of constitutional norms or constitutional ideas. Perhaps the descriptive tendencies of courts (such as O'Connor's conceptualization of home or her use of institutional images of hotels) are just as important for interpreting the cases as the results themselves. But more likely, the Court's conclusion leaves us with the uneasy feeling that all the Court is really talking about is ideas.